Supreme Court, U.S.
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No. 98-1541

IN THE

SUPREME COURT OF THE UNITED STATES

EVE BRUNEAU, A MINOR, BY AND THROUGH HER GUARDIANS AD LITEM, PAT SCHOFIELD AND JOHN BRUNEAU, *Petitioner*,

v.

SOUTH KORTRIGHT CENTRAL SCHOOL AND SOUTH KORTRIGHT SCHOOL BOARD, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner, Eve Bruneau, respectfully submits this reply brief in further support of her petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

I. THIS CASE IS AN APPROPRIATE CASE TO RESOLVE A THREE-TO-THREE SPLIT AMONG THE FEDERAL COURTS OF APPEALS.

Respondents do not deny that there is a clear and irreconcilable three-to-three split among the federal courts of appeals with respect to the question presented to this Court for review. Instead, they insist that Petitioner's case is "an inappropriate vehicle" for resolving the conflict. (Respondents' Br. 10-13.) Respondents are wrong.

Respondents argue that Petitioner would be precluded from recovering on a constitutionally-based § 1983 cause of action even if this Court holds that her § 1983 claims are not precluded by Title IX. Respondents assert that the proof standards are the same for Title IX claims and constitutionally-based § 1983 claims and therefore Petitioner would be collaterally estopped from relitigating Respondents' liability under § 1983. In support of this argument, Respondents present the dubious syllogism that with respect to standards of proof (1) Title VII equals § 1983, (2) Title VII equals Title IX and therefore (3) Title IX equals § 1983. Not a single part of Respondents' proffered syllogism is valid.

First, the ultimate conclusion of Respondents' syllogism is flatly wrong because the proof standards for Title IX and constitutionally-based § 1983 claims differ in important ways. Without resort to any doubtful analogies, Petitioner directly set forth in the Petition several ways in which the proof standards for Title IX claims and constitutionally-based § 1983 claims are very different. (Petition, 9-12). Those differences include the facts that (1) Title IX and § 1983 impose different standards of "notice," (2) Title IX, unlike §

1983, does not contain an additional aspect of liability based on "failure to train" and (3) Title IX, unlike § 1983, does not involve application of certain state law standards.[1] *Id.*

Respondents' brief in opposition conspicuously fails to address those significant differences at all. Rather, Respondents make the false assertion that all the § 1983 claims Petitioner actually alleged were also potential bases for recovering under Title IX. (Respondents' Br. 8). In making this assertion, Respondents selectively quote from Petitioner's First Amended Complaint, failing to mention that Petitioner's complaint alleged that Respondents had failed "to effectively train its administrators or teachers" and that this failure to train amounted to "a policy or custom of toleration of sexual harassment and gender discrimination." (First Amended Complaint ¶ 57.) Under both the District Court's Title IX charge and this Court's decision in *Gebser*, these allegations do not state a claim under Title IX.

Second, Respondents are wrong to equate the requirements for Title VII to the requirements for constitutionally-based § 1983 claims. In fact, numerous courts that have considered the question of whether passage of Title VII abolished constitutionally-based § 1983 claims based upon sexual discrimination have held that it did not, precisely because the two claims are distinct. *See, e.g., Southard v. Texas Bd. of Criminal Justice*, 114 F.3d 539, 550 (5th Cir. 1997) (holding that sexual harassment plaintiffs can bring independent claims for Title VII and constitutional

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[1] It is not surprising that the requirements of the two statutes vary significantly in light of this Court's recent holding that Title IX is Spending Clause legislation, whereas § 1983 was passed pursuant to section 5 of the Fourteenth Amendment. *Compare Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1997 (1998) with *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

violations pursuant to § 1983 and noting that at least eight other federal circuit courts have held the same).

Finally, Respondents' contention that the standards of proof for Title VII and Title IX are the same reveals an astonishing ignorance of the law. Last term this Court held unambiguously that the elements of proof for Title IX and Title VII are significantly different. *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998) (holding that, unlike Title VII, Title IX requires actual notice of sexual harassment).

Furthermore, Respondents' argument is remarkable given the history of this particular litigation. At trial and before the Court of Appeals, Petitioner argued that the standard of notice for her sexual harassment claim should be the constructive notice standard that has been adopted for Title VII. The District Court applied an actual notice standard and the Court of Appeals affirmed, citing this Court's opinion in *Gebser*, which held that Title VII's constructive notice standard does not apply to Title IX claims because Title IX is Spending Clause legislation whereas Title VII was enacted pursuant to section 5 of the Fourteenth Amendment. The fact that Respondents now feel constrained to argue that Title IX and Title VII standards are the same when they themselves secured an affirmance on the ground that they were different speaks volumes and merely provides further support for our proposition that the Petition is meritorious and should be granted.

Accordingly, this Court should reject Respondents' argument that Petitioner's case in an inappropriate one in which to resolve the undisputed three-to-three split among the federal courts of appeals.

II. THIS COURT SHOULD WITHHOLD DECISION ON THE PETITION UNTIL AFTER ITS RULING IN *DAVIS V. MONROE COUNTY BOARD OF EDUCATION.*

In the Petition, we argued that this Court should withhold decision on the Petition pending its decision in *Davis v. Monroe County Board of Education*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*), *cert. granted*, 119 S. Ct. 29 (1998) (argued on January 12, 1999). (Petition, 3-4 & 10-11). Specifically, we showed that if *Davis* is affirmed, it will be clear that Petitioner never had a Title IX claim in the first place and therefore her § 1983 claim could not possibly have been precluded by passage of Title IX. Thus, we demonstrated that if *Davis* is affirmed, it would be appropriate for this Court to grant the Petition, vacate the decision below and remand for further proceedings. Alternatively, we showed that if *Davis* is reversed, the question presented by the Petition will be ripe for plenary review, and the Petition should be granted.

In opposition, Respondents rely on a shorter version of the same argument that is discussed above, namely that the requirements of Title IX, Title VII and § 1983 claims are all the same, and therefore Petitioner cannot have a § 1983 claim since a jury rejected her Title IX claim. This argument should be rejected for the same reasons set forth in Point I above.

III. PETITIONER DOES NOT SEEK THIS COURT'S REVIEW OF THE COURT OF APPEALS' JUDGMENT WITH RESPECT TO HER § 1983 CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS.

Respondents include a section in their brief arguing that Petitioner's claims against the individual defendants should not be reviewed by this Court. (Respondents' Br. 9-10). Respondents are opposing an argument the Petitioner has not made. Petitioner does not seek this Court's review of the Court of Appeals' judgment with respect to her § 1983 claims against the individual defendants. Rather, the Petition only seeks review of the question of whether Title IX divested Petitioner of her ability to bring a constitutionally-based § 1983 claim against her school.

IV. THE COURT OF APPEALS INCORRECTLY APPLIED *SMITH V. ROBINSON.*

In the Petition, Petitioner showed that the Court of Appeals misapplied the test set forth in *Smith v. Robinson*, 469 U.S. 992 (1984), by focusing on whether Petitioner's Title IX claim and her § 1983 claim were based upon the same set of facts. (Petition, 7-12). Petitioner demonstrated that under the express language of *Smith*, the test is whether the *claims* are the same, not whether the facts are the same, and that here the claims are different. *Id.* In opposition, Respondents have ignored this argument altogether. They have made no attempt to deny that the appropriate test is the identity of the claims and not the identity of the underlying facts. Instead, they simply recite the holding of the Court of Appeals without any effort to rebut the substance of our argument that this case was incorrectly decided. Accordingly, Petitioner's attack on the Court of Appeals remains unrefuted, and the Petition should be granted for this reason as well.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, Eve Bruneau's petition for certiorari should be granted.

Respectfully submitted.

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